UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
MAURICE LEVITT and FRANCES NAOMI LEVITT,	)	CASE NO. 04-33200 HCD CHAPTER 7
	)	
DEBTORS.	)	
	)	
GARY D. BOYN and S.M. FINANCIAL SERVICES CORPORATION, as Successor in Interest to the Trustee,	)	
	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 04-3129
	)	
DAVID LEVITT,	)	
	)	
DEFENDANT.	)	

Appearances:

Gary D. Boyn, Esq., Trustee, plaintiff, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516;

Michael K. Banik, Esq., attorney for plaintiffs, 217 South Fourth Street, Elkhart, Indiana 46516; and

Benjamin Pavone, Esq., attorney for defendant, 7676 Hazard Center Drive, 5th Floor, San Diego, California 92108.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 31, 2006.

Before the court is the "Notice of Motion by David Levitt in Support of Motion for Relief from Judgment pursuant to Rule 60(b)," and supporting documents filed by defendant David Levitt ("defendant"), by counsel. The court construed the Notice to be the actual Motion for Relief from Judgment filed under Federal Rule of Bankruptcy Procedure 9024. The plaintiff S.M. Financial Services Corporation ("plaintiff"), as successor in interest to the Chapter 7 Trustee Gary D. Boyn, Esq. ("Trustee"), filed Plaintiff's Response to Defendant's Motion for Relief from Judgment, and the defendant filed a Reply Brief. The court took the matter under advisement on December 7, 2005. For the reasons that follow, the court denies the defendant's Motion.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(E) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Maurice and Frances Naomi Levitt filed a voluntary chapter 7 bankruptcy petition on June 11, 2004. *See* Case No. 04-33200. They reported that they are retired and live on their social security payments and a small pension, with a monthly income of $2,624.76 and monthly expenses of $2,622.67. Of importance to this proceeding is that they listed on Schedule B a debt of $447,236 that their son owes to them. To collect that debt as a non-exempt asset of the bankruptcy estate, the chapter 7 Trustee filed a Complaint on Account against David Levitt, son of the debtors. *See* R. 1.

The defendant was duly served with the Complaint and Summons on October 11, 2004. *See* R. 4. The Summons stated that the defendant was required to submit a motion or answer to the Complaint within thirty days. *See id.* Although the defendant did not file a proper answer or responsive pleading to the Complaint, he did send a letter to the court, which was received on October 26, 2004.[1] *See* R. 6. The court, in an abundance of caution and latitude to the pro se defendant, allowed the correspondence to serve as an answer. The letter did not respond directly to the Trustee's Complaint. Instead, it described the defendant's financial hardship and the

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[1] The letter did not comply with Rules 10 and 12(a) of the Federal Rules of Civil Procedure, made applicable in bankruptcy proceedings pursuant to Federal Rules of Bankruptcy Procedure 7010 and 7012.

parents' loans as "monies they gave me over the years . . . on the basis of parents helping a child." *Id.* The defendant asked the court to "terminate the proceedings" against him. *Id.* He attached to his letter a "Notice to Pay Rent or Quit," presumably as evidence of his dire straits, and an unauthenticated typed note from his parents, the debtors herein, telling him that they did not expect to be repaid. *See id.*, attach.

In its Order of November 1, 2004, the court ordered the parties to appear at a pre-trial conference scheduled for December 16, 2004. It required the defendant to be represented by an attorney and allowed counsel to appear telephonically. On December 16, however, neither the defendant nor counsel representing the defendant made an appearance. The court rescheduled the hearing for January 6, 2005, and the Order To Continue Hearing was duly sent to the parties.

On December 21, 2004, the court received another epistle from the defendant. *See* R. 10. He again notified the court of his financial hardship and of his inability to travel to the hearing or to hire an attorney. He again stated his hope that the legal proceedings against him could be terminated. The letter neither asserted a defense to the Complaint nor disputed its merits.

When neither the defendant nor his counsel appeared at the continued pre-trial conference held January 6, 2005, the court conducted the hearing on the Complaint without him. Counsel for the plaintiff provided the court with a fair and full summary of the defendant's position and his assertion that the debtors' loans to him were not loans but rather the parents' means of helping their son. The court, familiar with the record in the case, reviewed the letters tendered by the defendant, weighed their evidentiary value, and determined that they were not sufficient as responsive pleadings. In light of the failure of the defendant to have counsel present for the pre-trial conference or the continued hearing, the court granted the plaintiff judgment on the pleadings.

On January 20, 2005, the court entered Judgment on the Pleadings in favor of the Trustee in the sum of $454,009.37. On February 14, 2005, the adversary case was closed. With the court's approval, the Judgment was assigned to S. M. Financial Corporation, a New Jersey company that now is the successor in interest to the Trustee.

On September 21, 2005, eight months after judgment had been entered and well past the time for filing an appeal, *see* Fed. R. Bankr. P. 8002, the defendant appeared by counsel in this adversary proceeding. The attorney filed his motion to appear *pro hac vice* along with a "Notice of Motion by David Levitt in support of Motion for Relief from Judgment Pursuant to Rule 60(b)," "Memorandum of Points and Authorities in Support of Motion for Relief from Judgment," affidavit of the defendant, and declaration of the debtor Maurice Levitt. *See* R. 22-26. On October 6, 2005, the court granted the attorney's Amended Motion to Appear *Pro Hac Vice* on behalf of the defendant.[2] *See* R. 34.

In his Memorandum in support of his Motion seeking relief from the court's judgment, the defendant introduced his brief with this statement: "A parent's generosity should not be turned into a son's nightmare." R. 24 at 1. He admitted that he received the financial transfers from his parents over a four-year period. *See id.* He also admitted that he did not respond to the Trustee's Complaint "and thus tendered no defense" to it "due to a variety of overwhelming factors in his life." *Id.* He asked that the court vacate its judgment in this case, "where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful." *Id.* at 2 (quoting *Inryco Inc. v. Metropolitan Eng'g Co.*, 708 F.2d 1225, 1229-30 (7th Cir.), *cert. denied*, 464 U.S. 937 (1983) (citations omitted)). His reason for the default was a reiteration of the reason he had presented in his letters: It was "a particularly stressful period in his life in which he lost his job and his housing and had no emotional or financial resources." *Id.* at 3; *see also* Decl. of David Levitt. The defendant raised several challenges to the merits and validity of the underlying Complaint, as well.[3] He also

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[2] Responding to the court's Order of September 23, 2005, the defendant's attorney properly filed his notice of appearance on September 29, 2005. *See* R. 30. Responding to the court's Order of September 27, 2005, the attorney amended his Motion to Appear *Pro Hac Vice* on October 4, 2005. *See* R. 32. The court allowed the Defendant's Notice of Motion to serve as a Motion for Relief From Judgment.

[3] The defendant's defenses to the underlying judgment were threefold: (1) The parents' transfers to him did not constitute enforceable loans under California law. (2) Almost $200,000 of the transfers were barred by a California statute of limitations. (3) Assuming that the agreement between the parents and the son was a definite contract (a doubtful legal proposition, he asserted), the defendant argued that he has not breached the contract, since his situation has not improved, and thus he has not been able to repay the loans.

attached to his Memorandum the Declaration of Maurice Levitt, father of David and debtor herein. The debtor stated that he maintained records of the transfers of funds to his son but "would never enforce a right to repayment in court, as I considered the financial assistance I rendered to David a moral obligation for me as a parent, and I also viewed his as a moral obligation to repay when the time was right. I certainly hoped that he would someday repay it, and I still do." R. 24, Decl. of Maurice Levitt, at 2.

The plaintiff filed his Response. It recognized that the defendant implicitly requested relief within the "excusable neglect" exception of Rule 60(b), and set forth the Supreme Court's method of determining excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993). Applying the *Pioneer* criteria to this case, the Trustee urged the court to conclude that the defendant did not meet the standard. *See id.* at 3.

In his Reply Brief, the defendant agreed that he sought relief under the doctrine of excusable neglect and admitted that he mishandled the previous litigation and "was neglectful." R. 40 at 1. He apologized to the court and asked for forgiveness. To demonstrate that his neglect was excusable under *Pioneer*, he argued that (1) the prejudice to him is greater than the prejudice to the plaintiff S.M. Financial Services; (2) his period of irresponsibility is actually only 5 months – between December 16, 2004, when he failed to attend the pre-trial conference, and May 19, 2005, when he retained counsel – and so the delay should not be viewed as intolerably delinquent; and (3) the impact on the judicial proceedings is minimal because "it merely affects the legal relationship between the two parties involved, and only upsets the judgment in question." *Id.* at 4.

The defendant also challenged the merits of the judgment by asserting that his communication, "which was (generously) treated by the Court as an Answer, on October 25, 2004," *id.* at 3, set forth a meaningful defense – that the transfer of funds given to him by his parents over the years was parental help and was not meant to be repaid. *Id.* at 4. He acknowledged "that personal hardship does not provide one with license to ignore the orders of a federal judge," but nevertheless asked for sympathy concerning his financial plight. He admitted that his failure to respond was within his control, but stated that he had reached "a point at which reason directs a priority of actions, starting at food, shelter, and somewhere later, fiscal and social responsibility." *Id.* at 5. He asked the court to find

> no demonstrable prejudice; a delay that was not insignificant but not intolerable and had no consequential adverse impact on the proceedings; a reason for delay, while not beyond his control, that does provide one some cause for sympathy; and good faith that is fairly solidified in the record.

Id. After pointing out that the judgment would have a potentially disastrous effect on his future, the defendant then asked again for mercy from the court.

Discussion

The defendant seeks relief from the court's Judgment on the Pleadings of January 20, 2005. It certainly is within a bankruptcy court's discretion to grant relief from the entry of a judgment. *See Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 361 (7th Cir. 1997); *In re McDonald*, 118 F.3d 568, 569 (7th Cir. 1997); *In re Czykoski*, 320 B.R. 385, 388-89 (Bankr. N.D. Ind. 2005). As the defendant pointed out, a court may vacate the entry of a default judgment "if a party shows (1) good cause for its default; (2) quick action to correct it; and (3) a meritorious defense." *Robinson Eng'g Co. Pension Plan and Trust v. George*, 223 F.3d 445, 453 (7th Cir. 2000) (quoting *Zuelzke Tool & Eng'g Co., Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 229 (7th Cir. 1991)). However, the burden is on the party seeking relief from the judgment to establish the proper grounds for relief. *See Helm v. Resolution Trust Corp.*, 84 F.3d 874, 878 (7th Cir. 1996); *In re Czykoski*, 320 B.R. at 389.

Because the defendant's Motion was filed on September 21, 2005, more than ten days after entry of the court's Order of January 20, 2005, the court treats it as a motion for relief under Federal Rule of Civil Procedure 60(b), which is made applicable in bankruptcy cases under Federal Rule of Bankruptcy Procedure 9024. *See Easley v. Kirmsee*, 382 F.3d 693, 696 n.2 (7th Cir. 2004); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000). The defendant failed to refer to the subsection of Rule 60(b) upon which he relied; finally, with the help of the plaintiff, he stated in his Reply Brief that he sought relief under the doctrine of excusable neglect. Subsection (1) of Rule 60(b) provides that "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for such reasons as "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). A motion relying upon (b)(1) must be made within a year of the judgment. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393, 113 S. Ct. 1489, 1497, 123 L.Ed.2d 74 (1993)*; Disch v. Rasmussen*, 417 F.3d 769, 779 (7th Cir. 2005). In this case, the defendant's motion was filed 8 months after the judgment was entered; it therefore is timely.

However, relief under Rule 60(b) is an extraordinary remedy. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir.1997); *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 698 (7th Cir. 1995); *In re Czykoski*, 320 B.R. at 389 (citing cases). The defendant, as movant, has the burden of proving that his actions or failures constituted excusable neglect. *See Jones v. Phipps*, 39 F.3d 158, 162 (7th Cir. 1994) (stating that Rule 60(b)(1) "requires something more compelling than ordinary lapses of diligence or simple neglect to justify disturbing a default judgment"); *In re Hall*, 259 B.R. 680, 682 (Bankr. N.D. Ind. 2001) (placing burden of proof on movant). The Supreme Court's "excusable neglect" definition in *Pioneer* is used in Rule 60(b) determinations. *See Robb*, 122 F.3d at 359 (analyzing the broader meaning of excusable neglect after *Pioneer*).

The defendant admitted that his failure to attend the court's hearings or to respond to its orders or judgment constituted neglect but asserted that he should be excused. This court began with the Supreme Court's definition of "neglect" in *Pioneer:* The Court found that the term "encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* at 388, 113 S. Ct. at 1495. It held that the determination of "excusable neglect" is

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S. Ct. at 1498. The court then turned to the defendant's justifications for claiming excusable neglect. Even before the court entered judgment against him, the defendant used his pro se status, his lack of employment or savings, and his inability to pay his rent as reasons for excusing his decision not to participate in the court's hearings. *See* R. 6.

"It is difficult to understand how the conscious failure to attend a hearing, of which one was fully aware, could constitute mistake, surprise, excusable neglect, or some other reason justifying relief from the order that resulted." *In re Czykoski*, 320 B.R. at 389. The court generously construed the defendant's correspondence to the Clerk of the Court as an answer to the Complaint; nevertheless, it made clear that court rules required an attorney to represent him at the scheduled pre-trial conference. *See* R. 7. When the defendant did not have an attorney at the pre-trial conference or the continued hearing, and when he again wrote to the court asking it simply to terminate the proceedings against him, the court held him to the standard procedural rules and the mandates clearly set forth in the court's orders for all litigants. *See Jones*, 39 F.3d at 163 (stating that "pro se litigants are not entitled to a general dispensation from the rules of procedure or court imposed deadlines"); *see also Eglinton v. Loyer (In re G.A.D., Inc.)*, 340 F.3d 331, 335 (6th Cir. 2003) ("The procedural law and deadlines are straightforward" and are available for pro se litigants).

The defendant explained his failure to offer a defense to the Complaint, to attend the pre-trial conference and hearing, and to appeal the judgment by referring to the overwhelming factors in his life – he lost his job and housing and had no emotional or financial resources. In the Declaration of David Levitt, the defendant explained that he was employed by Follett Corporation between June 2003 and July 2004. *See* R. 25 at 1. However, after his termination, he found himself unemployed between July 21, 2004 and March 6, 2005. He declared that he was required to obtain credit card advances to pay for food and that he was evicted from his residence on October 13, 2004. *See id.* at 1-2.

However, when the court took account of all the relevant circumstances surrounding that time period, it found in the uncontested records of the defendant's parents (attached by the defendant to his Memorandum in support of his Motion) that the debtors sent their son $180,257.25 in 2003 (when he was employed) and

$36,376.39 in 2004, up to July 3, 2004.[4] *See* R. 24, Ex. A. They themselves filed bankruptcy on June 11, 2004. Their son has acknowledged receipt of those amounts but offered no further explanation. The court therefore cannot provide to the defendant the sympathy and understanding he seeks in his claim of excusable neglect.

When determining whether a defendant's consciously omitted attendances and responses are excusable, "the determination is at bottom an equitable one." *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498. The totality of the circumstances indicates that the parents transferred to their son almost half a million dollars between 2001 and 2004 and filed bankruptcy on June 11, 2004; then their son, after receiving those funds, claimed in this court that his mounting financial and emotional woes were overwhelming factors in his life excusing his failure to participate in this adversary proceeding. The court finds it inequitable to treat such behavior by the defendant as excusable neglect. It further determines that, by attempting to excuse his defaults, the defendant has not acted in good faith. Finally, the court finds that, under these circumstances, the defendant could not assume that the court would simply terminate the proceedings against him, "choose not to attend the scheduled hearing[s], and, upon learning that the assumption was in error, obtain relief under Rule 60(b)." *In re Czykoski*, 320 B.R. at 389. Accordingly, the court denies the defendant's Motion for Relief from Judgment.

Three other comments should be made. The first concerns the defendant's attempt to demonstrate that his filing of a Rule 60(b) motion to correct his default was not too belated. He pointed out that he retained counsel in May 2005 and that the attorney tried to settle the judgment debt against him before he filed the Motion for Relief from Judgment on September 21, 2005. He argued that his delay in filing the Motion was, therefore, not too irresponsible a delay on his part. *See* R. 40 at 3. The court agrees that the defendant's Rule 60(b) motion was filed within the one-year time frame required under Rule 60(b)(1), by any measure of counting. However, if the defendant intended to blame his attorney for any of the delay, he cannot: He "voluntarily chose this attorney as his representative in this action, and he cannot now avoid the consequences of the acts or omissions of this

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[4] The parents of David Levitt also reported sending their son $59,241.07 in 2001 and $176,736.05 in 2002. *See* R. 24, Ex. A.

freely selected agent." *Pioneer*, 507 U.S. at 397, 113 S. Ct. at 1499 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390, 8 L.Ed.2d 734 (1962)).

The second observation concerns the defendant's arguments attacking the judgment itself. The court's task herein is to review the defendant's Rule 60(b) motion seeking to set aside the judgment, and that review "involves only an inquiry into the actual denial of postjudgment relief – not into the merits of the predicate default judgment." *Swaim v. Moltan Co.*, 73 F.3d 711, 717 (7th Cir.), *cert. denied*, 517 U.S. 1244 (1996). The defendant failed to file a timely notice of appeal, once the judgment was entered. He cannot now present arguments that raise the propriety of the underlying judgment in this Rule 60(b) motion. *See Jones*, 39 F.3d at 162.

Finally, the court notes that the defendant addressed for the first time in his Reply Brief the determination of excusable neglect as set forth in *Pioneer*. Arguments presented for the first time in a reply brief are waived. *See Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005). Nevertheless, the court considered the *Pioneer* factors when determining that the defendant was unable to prove excusable neglect. It found that, if the defendant was granted relief from the judgment, then the plaintiff Trustee, who assigned the judgment for valuable consideration to S.M. Financial Services Corporation, would be prejudiced. It also noted that, during the eight months after entry of the judgment, the adversary case was closed and the judgment was assigned for collection. Indeed, the debtors' bankruptcy case now is closed, as well. A grant of relief from the judgment would have a genuine impact on the judicial proceedings. Because the court found that the defendant chose not to appear to oppose the Trustee's Complaint and chose not to appeal the judgment against him, the court finds that his defaults do not constitute excusable neglect and cannot justify relief from the judgment that resulted.

Conclusion

For the reasons presented above, the Motion for Relief from Judgment filed by defendant David Levitt is denied pursuant to Federal Rule of Civil Procedure 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT